STATE OF MICHIGAN

COURT OF APPEALS

JILL D. TYTOR, as Personal Representative of the Estate of NORBERT J. TYTOR, Deceased, Plaintiff-Appellant, v JAMES MACKENZIE, M.D., Defendant-Appellee.	UNPUBLISHED February 9, 2006 No. 262824 Oakland Circuit Court LC No. 04-057544-NM

Before: Murray, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Plaintiff, Jill D. Tytor, personal representative of the estate of Norbert J. Tytor ("Tytor"), deceased, appeals as of right an order granting summary disposition in favor of defendant, James MacKenzie, M.D. Plaintiff argues that the Michigan Supreme Court's decision in *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005) ("*Burton II*"), should be prospectively applied under the circumstances of this case and, therefore, that summary disposition in favor of defendant was improper. We affirm.

In this wrongful death action, plaintiff alleges that defendant, who was Tytor's physician, negligently failed to properly diagnose and treat Tytor's progressively worsening heart problems. Plaintiff claims that defendant's failure to treat Tytor or to refer him for specialized care contributed Tytor's death, on February, 22, 2002, following an attempted valve replacement surgery. Plaintiff was appointed personal representative of Tytor's estate on April 25, 2002. She served the notice of intent required by MCL 600.2912b for actions alleging medical malpractice on December 3, 2003. Plaintiff proceeded to file her complaint on April 13, 2004.

On January 6, 2005, defendant moved for summary disposition pursuant to MCR 2.116(C)(7). He argued that plaintiff's action must be dismissed because she did not wait 182 days to file suit after serving a notice of intent, as required by MCL 600.2912b(1). He also claimed that, at the earliest, she could have filed 154 days after serving the notice of intent as allowed by MCL 600.2912b(8) because defendant had not sent a written response by that time; regardless, her claim was filed before this 154-day period expired on May 5, 2004.

Plaintiff conceded that she violated MCL 600.2912b by failing to wait 154 days before filing and agreed that dismissal without prejudice was the correct remedy for non-compliance with the statute. However, she claimed that she was also authorized by law to refile the suit after

dismissal because the statute of limitations was tolled when she filed the early complaint along with her affidavit of merit. She cited *Burton v Reed City Hosp Corp*, 259 Mich App 74, 87, 89; 673 NW2d 135 (2003), rev'd 471 Mich 745 (2005) ("*Burton I*"), in which this Court held that a complaint filed before the termination of the notice period – when properly filed with an affidavit of merit – tolled the period of limitations where the defendants did not identify any prejudice as a result of the early filing. However, on January 26, 2005, the Supreme Court reversed *Burton I*. *Burton II*, *supra* at 745. The Supreme Court determined that, pursuant to MCL 600.2912b(1), a complaint *must* be filed *after* the relevant notice period in order to be effective and that an ineffective complaint does not toll the limitations period. *Id.* at 752-754. Accordingly, the Court concluded that this Court erred when it ruled that an early-filed complaint may toll the limitations period. *Id.* at 756.

After the Supreme Court released its decision in *Burton II*, defendant urged the trial court to dismiss plaintiff's claim with prejudice. The trial court appeared to reluctantly conclude that *Burton II* should be applied retroactively based on the reasoning of the *Burton II* opinion and on the trial court's conclusion that the Court easily could have made the rule prospective but declined to explicitly do so.

We review a trial court's grant of summary disposition pursuant to MCR 2.116(C)(7) de novo. *McKiney v Clayman*, 237 Mich App 198, 200-201; 602 NW2d 612 (1999). MCR 2.116(C)(7) allows for summary disposition when:

> [t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

Whether a cause of action is barred by the statute of limitations is also a question of law which we review de novo. *Id.* at 201.

Plaintiff bases her arguments in the trial court and on appeal, in part, on her claim that the saving provision, which applies to wrongful death actions, MCL 600.5852, required her to file her complaint within two years of the issuance of her letters of authority and, therefore, that it would be impossible for her to comply with both the waiting period in MCL 600.2912b and the deadline in MCL 600.5852 under the facts of this case. She correctly notes that, although the two-year statute of limitations for medical malpractice actions is tolled when a plaintiff files a notice of intent, MCL 600.5856(c), the saving provision is not similarly tolled when a plaintiff personal representative files such a notice. *Waltz v Wyse*, 469 Mich 642, 655; 677 NW2d 813 (2004). Accordingly, she claims that she was unable to comply with both the notice requirement that she file on or after May 5, 2004, and the two-year saving period during which a personal representative may bring suit which, here, ended on April 25, 2004. Defendant agrees with her basic analysis but argues that plaintiff's only remedy was to avoid the conundrum by anticipating the problem and serving her notice of intent no later than November 23, 2003. We disagree that plaintiff faced the apparent dilemma which is presumed by the parties.

Wrongful death actions charging malpractice are generally subject to a two-year statute of limitations. MCL 600.5805(6)[1]; *Ousley v McLaren*, 264 Mich App 486, 490; 691 NW2d 817 (2004). However, MCL 600.5852 (the "saving clause" or "saving provision"), provides for an extended period of time during which a personal representative may file the action. The action may be filed:

> at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run. [MCL 600.5852.]

Actions involving malpractice must also comply with the notice period enunciated in MCL 600.2912b. MCL 600.2912b(1) precludes a plaintiff from commencing a suit until the applicable period has passed from the date she serves the defendant with written notice of her intent to file. *Burton II, supra* at 751. The period is generally 182 days, but may be reduced to 154 days if the defendant does not send the written response required by subsection (7) within 154 days of receiving the plaintiff's notice of intent.[2] MCL 600.2912b(8); *Id.* If a plaintiff serves the notice of intent before the two-year malpractice statute of limitations expires, the statute of limitations is tolled for 182 days if it would otherwise expire during the notice period. MCL 600.5856(c); *Waltz, supra* at 651.

The following table lists the relevant facts in the instant case:

Event	**Date**
Tytor's death	February 22, 2002
Letters of Authority issued	April 25, 2002
Notice of Intent served	December 3, 2003
Original expiration of malpractice statute of limitations	*February 22, 2004*
Complaint filed	April 13, 2004
End of saving period	*April 25, 2004*
154 days after notice of intent served	May 5, 2004

[1] MCL 600.5805(5) was renumbered as MCL 600.5805(6) by 2002 PA 715, effective March 31, 2003. *Ousley v McLaren*, 264 Mich App 486, 490 n 3; 691 NW2d 817 (2004). We will refer to subsection (6).

[2] The parties agree that the notice period was not shortened by any of the other exceptions in MCL 600.2912b(3).

182 days after notice of intent served June 2, 2004

Expiration of tolled malpractice statute of limitations *August 22, 2004*

Here, the parties incorrectly conclude that plaintiff was bound to file within two years of her appointment as personal representative. Rather, because plaintiff served her notice of intent before the expiration of the statute of limitations for malpractice actions, the statute of limitations was tolled for 182 days because, otherwise, it would have expired during the 182-day notice period which ended on June 2, 2004.[3] MCL 600.5856(c); *Waltz, supra* at 651. Therefore, under these facts, the lack of tolling of the two-year saving provision was irrelevant. The parties appear either to have overlooked this fact or reached a mutual misunderstanding concerning the meaning of the saving provision. Their analysis fails to recognize that the saving clause operates to *suspend* a statute of limitations. *Id.* at 650-651. Thus, plaintiff could have waited and timely filed her complaint any time on or after May 5, 2004, but before August 22, 2004. Accordingly, because the April 13, 2004, complaint was filed early according to the MCL 600.2912b notice requirement, the outcome of the case depends solely upon whether *Burton II* must be applied retroactively.

The relevant facts in *Burton* are similar to those in the instant case. There, the plaintiff filed a medical malpractice action while the period of limitations was tolled during the notice period. *Burton I, supra* at 85. This Court noted that the remedy for an early filing is dismissal without prejudice; however, a plaintiff must still comply with the relevant statute of limitations. *Id.* at 82. There, as here, the statute of limitations then expired before the defendants moved for summary disposition, so the question became whether the plaintiff could still refile the suit. *Id.* at 79, 82. This Court noted the harsh result of precluding the claim because of a mere procedural deficiency. *Id.* at 83. It opined that preclusion would do nothing to serve the intent of statutes of limitations to guard against stale claims, particularly when a defendant is not prejudiced; this Court opined that the defendants were not prejudiced because they had been put on notice to preserve evidence, given that they had received the notice of plaintiff's intent to sue within the two-year statute of limitations. *Id.* at 83, 87-88. This Court therefore drew upon MCL 600.5856(a), which tolls a statute of limitations at the time the complaint and summons is served. *Id.* at 85. It found that the filing of the plaintiff's complaint, which was otherwise proper and included the required affidavit of merit, tolled the statute of limitations and allowed him to refile his claim after dismissal. *Id.* at 87, 89.

The Michigan Supreme Court disagreed in *Burton II*. The Court referred to the language of the medical malpractice notice provision which provides that "a person *shall not* commence an action alleging medical malpractice . . . unless the person has given . . . written notice under this section not less than 182 days before the action is commenced." MCL 600.2912b(1)

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[3] At the time plaintiff served her notice of intent on December 3, 2003, there were 81 days remaining in the two-year malpractice period of limitations, which would have ended on February 22, 2004. When notice was served, the statute was tolled for 182 days until June 2, 2004. Then, the limitations period resumed running for 81 days until August 22, 2004.

(emphasis added); *Burton II, supra* at 752. The Court concluded that "the Legislature's use of the word 'shall' indicates a mandatory and imperative directive." *Id.* Furthermore, this Court erred by basing its decision on whether there was prejudice to the defendants; such prejudice is not a factor in the relevant statutes. *Id.* at 753. Accordingly, the plaintiff's "failure to comply with the statutory requirement render[ed] the complaint insufficient to commence the action." *Id.* at 752, 754. The prematurely filed complaint, therefore, was ineffective and could not toll the limitations period under MCL 600.5856(a); summary disposition had been properly granted in favor of the defendants. *Id.* at 756.

We note that *Burton I* was decided on June 3, 2003, and, therefore, was good law during the relevant events of the instant case. *Burton I, supra* at 74. *Burton II* was decided on January 26, 2005, which fell after the last day on which plaintiff could have filed her complaint, which was August 22, 2004. *Burton II, supra* at 745.

It is well settled that judicial decisions are given retroactive effect, "applying to all pending cases in which a challenge . . . has been raised and preserved." *Wayne Co v Hathcock*, 471 Mich 445, 484; 684 NW2d 765 (2004). Thus, a prospective application of a judicial decision is a departure from the general rule and is only appropriate in "exigent circumstances." *Id.* at 484, n 98; *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005). As the Supreme Court noted in *Hathcock,* prospective only application of judicial decisions is "'limited to decisions which overrule clear and uncontradicted case law.'" *Hathcock, supra* at 484-485, n 98, quoting *Hyde v Univ of MI Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986).

In light of this precedent, we start off with the presumption that this case will be given retroactive application. Only if this case represents an exigent circumstance, wherein the Supreme Court's decision in *Burton II* overruled clear and uncontradicted case law, will it be given prospective application. In our view, the Supreme Court's ruling in *Burton II* did not overrule clear and uncontradicted case law. To the contrary, it was the first Supreme Court decision on this issue, and it reaffirmed the clear and unambiguous language of the statute, and was, according to that Court, consistent with at least three other Supreme Court decisions. Accordingly, the ultimate conclusion of the Supreme Court in *Burton II* did not overrule clear and uncontradicted case law, and therefore must be given retroactive effect.

In *Michigan Ed Employees Mut Ins Co v Morris*, 460 Mich 180; 596 NW2d 142 (1999), the Supreme Court granted leave to determine whether its decision in *Profit v Citizen's Ins Co of America*, 444 Mich 281; 506 NW2d 514 (1993), was to have retroactive effect. The Court concluded that it was. It reasoned that the Court of Appeals opinion that had been reversed by the Supreme Court in *Profit* had been contrary to the plain language of the statute at issue, as well as two prior Supreme Court opinions on the same or related issue. *Michigan Ed Employees Mut Ins Co, supra* at 184. In light of this prior precedent and clear statutory language that existed before the Court of Appeals decision in *Profit*, the Supreme Court concluded that its decision to reverse the Court of Appeals was not unexpected or indefensible and therefore would receive full retroactive effect:

> Only if this Court's decision can said to be "unexpected" or "indefensible" in light of the law in place at the time of the acts in question would there be a question about whether to afford the decision complete retroactivity. *People v*

> *Sexton*, 458 Mich 43, 64; 580 NW2d [4]04 (1998). It can hardly be considered "unexpected" or "indefensible" that this Court would reverse a Court of Appeals decision that was contrary to the clear and unambiguous language of the statute, the legislative intent behind the statute, and two prior opinions of this Court. [*Id.* at 195].

Likewise, in *Zanni v Medaphis Physician Services Corp*, 240 Mich App 472; 612 NW2d 845 (2000), a conflict panel of this Court followed the rationale of *Michigan Ed Employees Mut Ins Co* to conclude that "it likewise cannot be considered 'unexpected' or 'indefensible' that a conflict panel in this Court would overrule an earlier decision that was contrary to the clear and unambiguous language of a statute. Accordingly, we hold that our decision today is to be given full retroactive effect." *Id.* at 478. See also *People v Mishell*¸ 265 Mich App 616, 641; 696 NW2d 754 (2005).

As previously noted, in *Burton II* the Supreme Court reversed this Court's decision in *Burton I* because MCL 600.2912b(1) clearly states that a lawsuit "shall not" be commenced until notice was given, and because in applying analogous language under other statutory provisions, the Court had previously concluded that no tolling occurs unless the complaint is properly filed. See *Burton II*, *supra* at 752-753, relying upon *Scarsella v Pollack*, 461 Mich 547, 549; 607 NW2d 711 (2000), *Omelenchuk v City of Warren*, 461 Mich 567, 572, 576; 609 NW2d 177 (2000), overruled in part by *Waltz*, *supra*, and *Roberts v Macosta Co Gen Hosp*, 466 Mich 57, 65-67; 642 NW2d 663 (2002)(*Roberts I*). Thus, the Supreme Court's decision in *Burton II* is very similar to the situation presented in *Michigan Ed Employees Mut Ins Co* and in *Zannia*, *supra*. In other words, the Supreme Court's ruling in *Burton II* was "not a declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority . . . ." *Devillers*, *supra* at 587.

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly